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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: MM Docket No. 92-266 -- Ex Parte Presentation

Dear Mr. Caton:

This is to provide notice, pursuant to Section 1.1206(a) of the Commission's Rules, that the undersigned, as counsel for Affiliated Regional Communications, Ltd., met today with Mary P. McManus, Legal Advisor to Commissioner Ness. In addition to discussing ARC's reply comments, we reviewed the enclosures.

If you have any questions regarding this matter, please contact me.

Very truly yours,

Robert L. Hoegle
Robert L. Hoegle

RLH:ssm

Enclosures

cc: Mary P. McManus, Esquire (w/encl.)

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SPECIAL CIRCUMSTANCES OF AND PUBLIC INTEREST IN
LOCAL AND REGIONAL PROGRAMMING

SEP 30 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

I. Local And Regional Programming Services Are More Costly To Produce.

- "[L]ocal and regional programming services are usually costly to produce and appeal only to a limited population of subscribers...." Second Report and Order, MM Docket No. 92-264, 8 FCC Rcd. 8565 (1993), at ¶78.
- The programming for regional sports services is particularly expensive to produce because of the high costs of: (a) acquiring the rights to televise professional and collegiate sports events; and (b) acquiring and maintaining the equipment and crew needed to provide coverage of multiple sports events in a given day.

II. The Subscription And Advertising Revenue Base Of Local And Regional Programmers Is Limited By Definition.

- "Moreover, what makes NECN [a regional news service] different from other programming services, and even differentiates it from other new programming services, is the regional nature of its programming and audience appeal. Because this service by definition appeals to a much smaller potential subscriber base, it has a naturally limited distribution potential. The limited extent of the target market from which NECN can secure carriage reduces potential revenues from distribution as well as advertising." New England News, FCC 94-133 (rel. June 1, 1994), at ¶36 (emphasis in original).
- The television rights which may be licensed from local sports teams are limited by the professional and collegiate leagues.
- For regional sports services, there is no "residual" market for such sports programming. "Unlike feature films which have continuous audience appeal, sports events have substantial entertainment value only at the time of their occurrence." Regulations Pertaining to the Showing of Sports Events on Over-the-Air Subscription Television or by Cablecasting, 52 F.C.C.2d 1, 57 (1974), on recon., 54 F.C.C.2d 797 (1975), set aside on other grounds sub nom. Home Box Office, Inc. v. F.C.C., 567 F.2d 9 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1977).

III. Local And Regional Programmers Foster The Important Public Interest Objective Of Preserving "Localism" In Programming.

- Congress specifically identified in the 1992 Cable Act a "substantial governmental interest in ensuring [the] continuation" of the "local origination of programming." See §2(a)(10).

- It is well established that the public interest is served by live coverage of "outstanding local events [such] as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest." United States v. Midwest Video Corp., 406 U.S. at 668-69, quoting National Broadcasting Co. v. United States, 319 U.S. 190, 203 (1943) (*emphasis added*).
- Local and regional programming services are "responsive to the needs and tastes of local audiences and serv[e] Congress' objectives of promoting localism." Second Report and Order, MM Docket No. 92-264, 8 FCC Rcd. 8565 (1993), at ¶78.
- The Commission also expressly acknowledged record evidence in the Sports Migration proceeding that "[r]egional cable networks also serve the public interest objective of local origination of programming by providing television coverage for the first time to teams from local colleges and high schools, or to other events, such as the Special Olympics." Final Report in PP Docket No. 93-21, FCC 94-149 (rel. June 30, 1994), at ¶88. See attached excerpt from Final Report in the Sports Migration proceeding for specific examples of the additional public interest benefits of regional sports programming.

IV. Local And Regional Programmers Foster The Important Public Interest Objective Of Increasing the "Diversity" Of Available Programming.

- Congress identified the promotion of "the availability to the public of a diversity of views and information" as one of the key policies underlying the 1992 Cable Act. See §2(b)(1).
- Again, the Commission and the courts repeatedly have recognized that program origination by cable operators serves the public interest "by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services." United States v. Midwest Video Corp., 406 U.S. 649, 667-68 (1972).
- "In fact, the growth in cable sports programming appears to have benefited lower profile sporting events, such as the Special Olympics, by providing television exposure to sports that would otherwise be unable to obtain it....We agree with ARC that the nature of regional cable networks allows them to be more flexible than broadcast stations in choosing material for carriage. Thus, the growth of cable sports programming in this area appears to indicate an increase in viewer choice rather than migration from free over-the-air television to cable, and should therefore be considered to be in the public interest." Final Report in PP Docket No. 93-21, FCC 94-149 (rel. June 30, 1994), at ¶92.

- The Commission expressly has acknowledged that the development of regional sports programming services has contributed substantially to the overall increase in the diversity of programming services available to consumers. See Competition, Rate Deregulation And the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd. 4962, 4966 n.8 (1990) (number of cable programming services doubled between 1984 and 1990, with regional sports services being a "primary growth area").

covering college basketball games that would otherwise not be televised at all.

F. Other Sports

1. Background

87. The Interim Report stated that cable and collegiate commenters indicated that national and regional cable sports networks provide coverage of a wide variety of previously untelevised professional and amateur sporting events, as well as sporting news, commentary and other informational programs involving specific sports, fitness and outdoor activities. According to the Interim Report, a number of commenters specifically mentioned the decline of professional boxing on broadcast television, noting that boxing has essentially moved to cable and other subscription services. As to the reasons for this trend, ABC agreed that boxing has essentially moved from broadcast to cable and other subscription services, but argued that boxing has a more specialized audience than other sports listed in the Notice and that it does not have as extensive a history on broadcast television. NCTA asserted that boxing was abandoned by broadcasters before the inception of cable networks, and argues that cable has brought regular coverage of boxing back to prime time.¹²⁷ The Further Notice requested additional comments on the migration of any sporting events other than those in professional football, basketball, baseball and hockey, and college football and basketball, as well as any other relevant topics not otherwise specifically identified.¹²⁸

2. Comments

88. With respect to the Olympic Games, the National Cable Television Association ("NCTA") points out that NBC has announced that it will not take a cable partner for televising the 1996 Summer Olympic Games. In addition, consistent with the Interim Report, ARC states that cable sports networks, particularly regional sports networks, televise a wide variety of sporting events never previously carried by broadcast television. ARC submits that, unlike broadcast stations which face pressures to clear network-provided programming during most of their broadcast day, regional cable sports networks are devoted entirely to sports and can experiment with coverage of new events. In several cases, such as women's college basketball and professional beach volleyball, sports which were first carried on cable have gained enough popularity to attract broadcasters, resulting in reverse migration. Regional cable networks also serve the public interest objective of local origination of programming, by providing television coverage for the first time to teams from local colleges and high schools, or to other events, such as the Special Olympics.¹²⁹

¹²⁷ Interim Report, 8 FCC Rcd at 4887.

¹²⁸ Further Notice, 9 FCC Rcd at 1651.

¹²⁹ NCTA Reply at 2; ARC Comments at 16-18.

89. In this connection, since 1989, Home Sports Entertainment ("HSE"), a regional sports cable service, has produced and carried an annual two-hour special covering the Texas Special Olympics ("TSO") Summer Games and has repeated the program four to five times each year, while broadcast television only provides occasional short news stories and documentaries about the Special Olympics. TSO states that it derives substantial benefits from this regional cable coverage, including improved recruitment, enhanced benefits for Special Olympians, increased exposure of TSO events to an entirely new audience, *i.e.*, sports fans, and improved public perception of mental retardation. According to TSO, the public relations and educational value of such exposure is "incalculable."¹³⁰

90. HSE also provides coverage of sporting events of University Interscholastic League ("UIL"), a league comprised of public high school teams in Texas. UIL asserts that broadcast television stations and networks have no interest in carrying UIL events and regional cable networks provide its only television outlet. For instance, HSE provides live coverage of UIL state finals in boys basketball, football and baseball, highlights of state track & field, tennis and golf championships and provides weekly shows highlighting UIL teams. Broadcast television, on the other hand, has only carried one UIL sporting event live. UIL sought bids for live coverage of the state championship games now carried by HSE and no broadcasters expressed an interest, even when UIL offered to make them available for free.¹³¹

91. The commenters also support the Commission's initial conclusion that there is no migration of other college sports from broadcast to cable. The University of Denver ("Denver") submits that the FCC should not overlook the substantial and tangible benefits resulting from cable coverage of college sports events. Denver hockey games have been televised by regional sports networks in the U.S. and in Canada, thereby generating significant interest in the school on the part of prospective students and student athletes. This widespread exposure would be impossible to obtain on broadcast television and cable coverage has also helped fund-raising efforts among Denver alumni. For these reasons, Denver believes that regulations restricting cable coverage would adversely affect Denver and sports fans alike.¹³²

3. Findings

92. The record indicates that there is no evidence of migration in other college, professional or amateur sports. In fact, the growth in cable sports programming appears to have benefited lower profile sporting events, such as the Special Olympics, by providing television exposure to sports that would otherwise be unable to obtain it. We also find no evidence in the record to indicate that anything other than pure market forces is responsible

¹³⁰ TSO Comments at 1-4.

¹³¹ UIL Comments at 1-2.

¹³² Denver Comments at 2-3.

for the lack of broadcast coverage of these events. We agree with ARC that the nature of regional cable networks allows them to be more flexible than broadcast stations in choosing material for carriage. Thus, the growth of cable sports programming in this area appears to indicate an increase in viewer choice rather than migration from free over-the-air television to cable, and should therefore be considered to be in the public interest.

III. PRECLUSIVE CONTRACTS

A. Background

93. The 1992 Cable Act directs the Commission to "analyze the extent to which preclusive contracts between college athletic conferences and video programming vendors have artificially and unfairly restricted the supply of the sporting events of local colleges for broadcast on local television stations" and, in consultation with the Attorney General, to "determine whether and to what extent such preclusive contracts are prohibited by existing statutes."¹³³ The Act defines a "preclusive contract" as a contract which prohibits a local television station from presenting either a live local college event that is not carried live by any local cable system or a local college event shown on a tape-delayed basis that is not carried, live or tape-delayed, by a local cable system.

94. In the Notice, we asked whether there is a significant connection between preclusive contracts and migration of games to cable, and sought comment on the economic and social consequences of preclusive contracts. Commenters' arguments regarding preclusive contracts focused on college football. In the Interim Report, we found that the precise interplay between the various contracts was difficult to discern from the comments filed. INTV argued that the net effect of preclusive contracts is to prevent individual stations from contracting separately with individual schools to televise games of local or regional interest during the most popular Saturday afternoon viewing periods. Other commenters, such as Capital Cities/ABC, Inc. ("ABC"), the CFA and ESPN, argued that their football contracts are not preclusive because they permit broadcast stations serving the markets of the competing teams to televise games at any time, including during the exclusivity windows.¹³⁴

95. Based on the information available to us in the Interim Report, we did not believe that we could make specific findings regarding the existence, prevalence, or legality of preclusive contracts. Therefore, our Further Notice sought additional comments on how the various contracts operate. In particular, we asked for information on: (1) specific exclusivity provisions in contracts for college football rights; (2) the economic impact of the "home team exception" and short notice provisions; (3) the relevant product and geographic markets for telecasts; (4) efficiencies promoted by such contracts; (5) increases or decreases

¹³³ Cable Act of 1992, § 26(c)(1).

¹³⁴ Interim Report, 8 FCC Rcd at 4888.